

**Security Council**

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Letter dated 20 March 2015 from the Secretary-General addressed to the President of the Security Council

I have the honour to transmit herewith a copy of the letter dated 9 March 2015 signed by Judge Sang-Hyun Song, President of the International Criminal Court, as well as its enclosure, namely, the decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan issued by Pre-Trial Chamber II on 9 March 2015 in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (see annex).

By its resolution 1593 (2005) of 31 March 2005, the Security Council referred the situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court. In its decision of 9 March 2005, Pre-Trial Chamber II found that the Republic of the Sudan had failed to cooperate with the Court with respect to its requests for the arrest and surrender of Omar Hassan Ahmad Al Bashir.

In his letter, the President of the International Criminal Court transmits a copy of the Pre-Trial Chamber's decision for onward transmission to the Security Council, pursuant to article 17, paragraph 3, of the Relationship Agreement between the United Nations and the International Criminal Court.

I should be grateful if you would transmit the letter from President Song and the decision issued by Pre-Trial Chamber II to the members of the Security Council and bring these documents to their attention.

(Signed) **BAN** Ki-moon



Annex

Letter dated 9 March 2015 from the President of the International Criminal Court addressed to the Secretary-General

[Original: English]

Pursuant to article 17 (3) of the Relationship Agreement between the United Nations and the International Criminal Court, and in accordance with article 87 (7) of the Rome Statute and regulation 109 (4) of the Regulations of the Court, and as requested by Pre-Trial Chamber II, I hereby transmit the decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan of the said Chamber, dated 9 March 2015 (see enclosure).

I would be grateful if you could convey the present letter and the attached decision to the Security Council.

(Signed) Sang-Hyun **Song**

Enclosure

[Original: English and French]

No.: ICC-02/05-01/09

Date: 9 March 2015

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

Public

Decision on the Prosecutor's Request for a Finding of Non-Compliance
Against the Republic of the Sudan

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Mr Nick Kaufman

Ms Wanda M. Akin

Mr Raymond M. Brown

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Competent authorities of
the Republic of Sudan

Others

Presidency

Bureau of the Assembly of States
Parties

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Others

Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court" or the "ICC") issues this decision on the "Prosecution's request for a finding of non-compliance against the Republic of the Sudan in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to Article 87(7) of the Rome Statute" (the "Prosecutor's Request" or "Application").¹

The present decision is classified as public although it refers to the existence of documents which have been submitted and are currently treated as under seal, confidential, *ex parte* Prosecutor only and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as under seal and confidential, *ex parte* Prosecutor only. The references made in the present decision have been kept to a minimum as they are required for the sake of judicial reasoning.

I. PROCEDURAL HISTORY

1. On 31 March 2005, the Security Council (the "SC" or the "Council") acting under Chapter VII of the Charter of the United Nations (the "UN") adopted Resolution 1593(2005) referring the situation in Darfur, Sudan to the Court.²

2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I ("PTC I") issued two warrants of arrest against Omar Hassan Ahmad Al Bashir ("Omar Al Bashir").³ These warrants of arrest remain to be executed.

3. On 5 March 2009 and 21 July 2010, the Registry, acting upon PTC I's request, issued the "Request to the Republic of the Sudan for the arrest and Surrender of

¹ ICC-02/05-01/09-219.

² S/RES/1593 (2005).

³ Pre-Trial Chamber I, "Warrant of Arrest for Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-1; "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir", 12 July 2010, ICC-02/05-01/09-95.

Omar Al Bashir”⁴ as well as the “Supplementary Request to the Republic of the Sudan for the arrest and surrender of Omar Hassan Ahmad Al Bashir” (the “2009 and 2010 Requests”).⁵ These requests called for the cooperation of Sudan in the arrest and surrender of Omar Al Bashir, pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the “Statute”).

4. On 31 March 2009, the Registry filed the “report on the transmission of the Requests for Arrest and Surrender [...] to States Parties and Non States Parties pursuant to the Decision dated 4 March 2009”, together with five annexes appended thereto (the “31 March 2009 Registry Report”).⁶

5. On 25 May 2010, PTC I issued the “Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan” in the context of the case of the *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*.⁷

6. On 15 September 2010, PTC I received the “Report of the Registrar on the transmission of the requests and supplementary requests for the arrest and surrender of Omar Hassan Ahmad Al-Bashir”,⁸ together with six annexes appended thereto (the “15 September 2010 Registry Report”).

7. On 15 March 2012, the Presidency issued the “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the

⁴ ICC-02/05-01/09-5.

⁵ ICC-02/05-01/09-101.

⁶ ICC-02/05-01/09-18-US-Exp and its annexes.

⁷ Pre-Trial Chamber I, ICC-02/05-01/07-57.

⁸ ICC-02/05-01/09-113-Conf-Exp and its annexes.

Congo, Darfur, Sudan and Côte d'Ivoire situations", in which it reassigned, *inter alia*, the situation of Darfur, Sudan to this Chamber.⁹

II. APPLICABLE LAW

8. The Chamber notes articles 21(1)(a) and (b), 86, 87(7) 89 and 97 of the Statute, rule 195(1) of the Rules of Procedure and Evidence (the "Rules"), regulation 109(2), (3) and (4) of the Regulations of the Court (the "Regulations") and article 17(3) of the Negotiated Relationship Agreement between the ICC and the UN (the "Relationship Agreement").

III. DETERMINATION BY THE CHAMBER

9. The Chamber recalls the 2009 and 2010 Requests in which the Registrar transmitted to Sudan the two cooperation requests for the arrest and surrender of Omar Al Bashir. In relation to the first warrant of arrest, the Registrar reported in the 31 March 2009 Registry Report, that the "representative of the Republic of Sudan [refused to receive these documents] and indicated that Sudan did not recognize the jurisdiction of the Court".¹⁰ The Sudanese Government reacted in a similar manner with respect to the second warrant of arrest and the subsequent request for arrest and surrender prepared by the Registrar on 21 July 2010.

10. According to the 15 September 2010 Registry Report, the Registrar, being aware of the Sudanese previous non-cooperative position, invited the competent authorities of the country "for a discussion to facilitate the communication" between the Sudanese Government and the Court.¹¹ Nonetheless, following two telephone conversations between the representative of the Court and the

⁹ Presidency, ICC-02/05-01/09-143.

¹⁰ ICC-02/05-01/09-18-US-Exp, para. 8; ICC-02/05-01/09-18-US-Exp-Anx3.

¹¹ ICC-02/05-01/09-113-Conf-Exp-Anx3.

Sudanese Embassy on 1 and 3 September 2010 respectively, the competent authorities of Sudan made it clear that they “cannot receive any document from the Court and that *this position will not change*” (emphasis added).¹²

11. Indeed, in a number of statements issued by Sudanese officials following the issuance of the 4 March 2009 and the 12 July 2010 warrants of arrest respectively, it became self-evident that Sudan deliberately refuses to cooperate with the Court in the arrest and surrender of Omar Al Bashir. In presenting his ninth report to the SC on 5 June 2009, pursuant to resolution 1593(2005),¹³ the Prosecutor quoted the Sudanese presidential assistant saying that, “[n]o Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the [Court], and we will not even send a lawyer to represent us there”.¹⁴

12. Further, in response to the Prosecutor’s seventeenth briefing to the SC on 5 June 2013, the Sudanese representative expressly stated that the “Prosecutor’s demand that [the Sudanese government] implement the arrest warrants issued against [Omar Al Bashir] and other Sudanese officials is unacceptable because it is based on faulty logic [and] [w]hat is based on wrong is of necessity wrong itself”.¹⁵ In the same vein, the Sudanese Ambassador to the UN more recently stated that “our participation [in the respective meeting before the SC] does not mean that we recognize the [ICC] or that we are going to cooperate with it, since the Sudan is not a party to the Rome Statute”.¹⁶

13. In this context, the Chamber wishes to highlight that indeed only States Parties to the Statute are under an obligation to cooperate with the Court. Given

¹² ICC-02/05-01/09-113-Conf-Exp-Anx3; also ICC-02/05-01/09-113-Conf-Exp, para. 8.

¹³ S/RES/1593 (2005), para. 8.

¹⁴ ICC-02/05-01/09-219, para. 15.

¹⁵ ICC-02/05-01/09-219, para. 26.

¹⁶ ICC-02/05-01/09-219, para. 18.

that the Statute is an international treaty governed by the rules set out under the Vienna Convention on the Law of Treaties, it is only with the State's consent that the Statute can impose obligations on a non-State Party.¹⁷ Nevertheless, this principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, create an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter.

14. Sudan is a UN member since 12 November 1956, and as such, it is bound by the terms of the UN Charter including its article 25 according to which "[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the [...] Charter". In its advisory opinion on *Namibia* the International Court of Justice ("ICJ") stated, "when the Security Council adopts a decision under article 25 in accordance with the Charter, it is for member States to comply with that decision [...]. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter".¹⁸

15. The SC adopted resolution 1593(2005) in which it was *decided* that the "Government of Sudan [...] *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".¹⁹ The legal effect of this resolution is twofold. First, Part 9 of the Statute and the

¹⁷ UNTS, Vol. 1155, art. 34; See also Pre-Trial Chamber II, "Decision on the 'Prosecution's Notification of Travel in the Case of The Prosecutor v Omar Al Bashir'", 1 October 2014, ICC-02/05-01/09-208, para. 10; Pre-Trial Chamber I, "Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council", 28 August 2013, ICC-01/11-01/11-420, para. 12.

¹⁸ ICJ, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)", Advisory Opinion, 21 June 1971, para. 116.

¹⁹ SC Res 1593(2005), para. 2.

relevant Rules governing State Party cooperation become applicable vis-à-vis Sudan. Second, Sudan is expected, consequently, to provide the necessary cooperation envisaged in said resolution including the implementation of the 2009 and 2010 Requests calling for the arrest and surrender of Omar Al Bashir in accordance with the Court's cooperation regime set out in Part 9 and its national laws. Therefore, should Sudan have faced any legal impediment to comply with these requests, the Sudanese authorities should have consulted or notified the Court in accordance with article 97 of the Statute and rule 195 of the Rules of the existence of a problem related to the execution of the Court's requests.

16. In view of the foregoing, the Chamber considers that Sudan not only disregarded the 2009 and 2010 Requests related to its obligation to cooperate in the arrest and surrender of Omar Al Bashir, pursuant to articles 86 and 89 of the Statute, but also SC Resolution 1593(2005). It also did not discharge its obligations to consult or notify the Court of any impediment to execute the pending requests. This course of action calls upon the SC to take the necessary measures they deem appropriate.

17. In this context, the Chamber wishes to reiterate that, unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the SC, acting under Chapter VII of the UN Charter, refers the situation in Darfur, Sudan to the Court as constituting a threat to international peace and security, it must be expected that the Council would follow-up by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of Sudan to cooperate in fulfilling the Court's mandate as entrusted to it by the Council. Otherwise, if there is no follow

up action on the part of the SC, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.

18. Having stated the above, the Chamber recalls article 87(7) of the Statute according to which, “[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute [...] the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council”. However, before making a finding to that effect, regulation 109(3) of the Regulations dictates that the “Chamber shall hear [first] from the requested State”.

19. In this regard, the Chamber notes that Sudan has constantly refused to engage in any sort of dialogue with the responsible organs of the Court over the past six years. As such, the Chamber considers that Sudan has waived its right to be heard on the matter, and it may accordingly proceed to the next step regarding Sudan’s non-cooperation with the Court. Since Sudan has failed to cooperate with the Court with regard to the arrest and surrender of Omar Al Bashir as explained in the relevant parts of this decision, thus preventing the institution from exercising its functions and powers under the Statute, the Court cannot but refer the matter to the SC for the Council to take appropriate measures. In this context, the Chamber deems it appropriate to also notify the competent authorities of Sudan, the Prosecutor, the participants in relation to the present case, as well as the Assembly of States Parties to the Statute, of this decision for their information.

FOR THESE REASONS, THE CHAMBER HEREBY

a) finds that the Republic of Sudan: (1) has failed to cooperate with the Court by deliberately refusing to liaise with the relevant organs of the Court and execute the pending requests for the arrest and surrender of Omar Hassan Ahmad Al Bashir, thus preventing the Court from exercising its functions and powers under the Statute; and (2) has failed to consult the Court in accordance with article 97 of the Statute and rule 195(1) of the Rules on any problem(s) which could have impeded the execution of the requests for arrest and surrender of Omar Hassan Ahmad Al Bashir, namely to bring to the attention of the Court relevant information which would have assisted it in deciding on any such problem; and

b) refers, in accordance with regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, pursuant to article 17(3) of the Relationship Agreement.

Done in both English and French, the English version being authoritative.

Judge Ekaterina Trendafilova
Presiding Judge

Judge Cuno Tarfusser

Judge Christine Van den Wyngaert

Dated this Monday, 9 March 2015

At The Hague, The Netherlands